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IN THE

Supreme Court of the United States

October Term, 1963
No. 11

NICO JACOBELLIS,

Appellant,

vs.

STATE OF OHIO,

Appellee.

On Appeal From the Supreme Court of the State of Ohio.

Motion for Leave to File Tardy Brief Amicus Curiae of Citizens for Decent Literature, Inc., an Ohio Corporation, in Support of Appellee.

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Citizens for Decent Literature, Inc., an Ohio Corporation, with local affiliates throughout the United States is a non-profit, non-sectarian and non-political corporation with national headquarters in Cincinnati, Ohio, formed for and dedicated to the cause of good, decent and wholesome literature with a view to oppose and eliminate obscene literature, by cooperating with law enforcement in the enforcement of the laws. For the Court's convenience, *amicus curiae* is hereinafter referred to by the single short title, CDL.

The formulation of CDL grew out of an impelling demand on the part of the larger segments of society, especially responsible fraternal, civic and religious organizations, which seek to bring under control the nationwide dissemination of obscene literature.

CDL believes that there exists a growing flood of publications, purposely designed and manufactured with a sensationalized appeal to prurient interest, that threatens to overthrow the basic morality upon which our nation and our Constitution were founded; that while the First Amendment of our Constitution has, from the time of our nation's founding, been construed to afford no protection to such publications, a loud voice is now being heard in the court-room advocating the overruling of this "balancing of interest" interpretation in favor of an absolutist approach, aimed at nullifying the nation's basic obscenity laws.

At its recent national convention in Chicago during October 1963, the national organization of Citizens for Decent Literature adopted a policy aimed at giving increased support in the fight against "obscenity", through legal advocacy in the court-room in support of the people's case. Such action made possible, for the first time, the filing of the brief referred to herein.

Nico Jacobellis v. State of Ohio is a motion picture film case of nationwide and historical importance which will have a serious effect on enforcement of the obscenity statutes throughout the nation. This Court's recent action in restoring the Jacobellis case to the calendar for further argument has prompted CDL to request leave of Court to file a tardy brief *amicus curiae* in support of appellee herein.

The consent of counsel of record for appellee has been obtained and has been filed with the Clerk. Counsel of record for appellant has indicated an unwillingness to consent to such filing.

CDL believes that its brief in this case can assist this Court in its determinations on the following principles of law:

(1) The "scienter" provision of section 2905.34 of the Ohio Revised Code, as construed in the opinion of the court below, is consistent with the "scienter" requirement announced by this Court in *Smith v. California*, 361 U. S. 147 (1959).

(2) The construction of section 2905.34 of the Ohio Revised Code, adopted by the court below (that the phrase "knowingly possess" required the element of *mens rea*, namely, a guilty or wrongful purpose, and the phrase "in his possession or under his control" required possession and control for the purpose of circulation or exhibition) is binding on this Court. A similar proscription was approved by this Court in *Alberts v. California*, 354 U. S. 476 (1957).

(3) The construction of section 2905.34 of the Ohio Revised Code, adopted by the court below (that the phrase "in his possession or under his control" required possession and control for the purpose of circulation or exhibition) describes a crime which is in the nature of an "attempt." A *successful* "attempt", will not support two convictions.

(4) Those provisions of section 2905.34 of the Ohio Revised Code which have no application to the limited facts in this appeal, are not subject to review by this Court in advance of an actual controversy.

(5) The trial court, in finding the motion picture film, "The Lovers" obscene, applied proper constitutional standards (*i.e.*, the standards prescribed by this Court in *Roth v. U.S.* and *Alberts v. Calif. (supra)*). Such standards do not contemplate involvements in "hard-core pornography" concepts or "clear and present danger" tests.

(6) The determination of obscenity is primarily an issue of fact. Constitutional review in this matter is limited to the question, "Whether reasonable minds could differ beyond a reasonable doubt that the motion picture film, 'The Lovers' is obscene."

In light of the above, motion is therefore made for leave to file a brief amicus curiae in support of the appellee in the above-entitled cause.

Respectfully submitted,

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Counsel for Amicus Curiae.